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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

NO. 1550

72-1550

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

BARRY I. SLOTNICK
15 Park Row
New York, N.Y. 10038
Counsel for Petitioner

JACOB KOSSMAN
1325 Spruce Street
Philadelphia, Pa. 19107
of Counsel

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

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The Memorandum for the United States in Opposition to the Petition for Certiorari is marred by such factual distortions and legal misconceptions that a brief reply is made necessary.

1. The United States is attempting to sidestep the issue of the gross misbehavior of the Government in this case. The Solicitor General, in referring to those acts, speaks of "alleged misconduct" (p. 5) about which the courts below expressed

"disapproval" (p. 4). Government misconduct in this case is not "alleged" – it has been thoroughly proved! The evidence was extracted from the unwilling Government after years of official deception. The 1968 Department of Justice Memorandum, brought to light in this post-conviction proceeding, reveals the bald prosecutorial conspiracy to conceal the illegal placing of electronic bugs in a lawyer's office by a surreptitious breaking and entry at night in 1963.

The primary role of United States Attorney Robert Morgenthau in this matter is disclosed on the face of the memorandum. Two Assistant Attorneys General and the Chief of the Fraud Section of the Criminal Division are direct parties to the Memorandum. These officials were deciding in 1968 whether to continue to hide the 1966 indictment against petitioner. As we now know that indictment was hid and never unsealed. Someone, and we do not yet know who, decided that the concealment activities would be aided by bringing forth in 1969 a fresh indictment. This whole pattern of inexcusable behavior, successfully disguised from petitioner and from the courts for years, cannot be described with any reasonable accuracy in the laundered language of the Solicitor General as "alleged misconduct."

In the Court of Appeals, the United States was slightly more candid in its argument. Counsel for the Government then described the actions of the prosecutors as "unwise," "misguided," and "improper." Even these phrases did not do justice to the calculated plan to conceal illegal electronic surveillance by suppression of the indictment against petitioner. At least it was then admitted that a serious error had been

committed. The Solicitor General's current view in this Court is that the whole affair involves merely "alleged" misconduct.

The District Court "firmly condemned" the Government for its actions, which Judge Constance Baker Motley described as "unworthy and discreditable." Translated in the cosmetic language of the Solicitor General, Judge Motley expressed mere "disapproval."

The attitude expressed by the Solicitor General is further demonstration of the necessity for this Court to grant the writ of certiorari in this case. The highest officers of the Department of Justice are not holding themselves accountable for the behavior of prosecuting authorities who intentionally violate the Sixth Amendment rights of defendants. Government prosecutors are invested with great discretion on many issues, including the timing of criminal prosecutions. This Court's declarations on the right to a speedy trial make the proper exercise of those prosecutorial powers a factor in the balance of factors that concern speedy trial. This Court declared in *Barker v. Wingo*, 407 U.S. 514 (1972), that the conduct of the Government was one of the key factors in determining whether the Sixth Amendment had been violated. The Solicitor General implicitly denies that in his Opposition. Until the highest officials of the Department of Justice can openly and fairly deal with the issues of misconduct in the denial of speedy trial, this Court's decision in *Barker v. Wingo* will be a nullity in the prosecutors' offices.

2. The Memorandum in Opposition fails to respond to petitioner's contention that the burden of proof on the issue of prejudice should lie on the Government after substantial delay.

Of the *four* factors which this Court held relevant in *Barker v. Wingo*, the only *one* which the Government seems to acknowledge is defense prejudice. In light of the massive delay of three years from indictment to trial, petitioner contends that the evidentiary burden should be placed on the Government. The response of the Opposition is designed to fend off the seriousness of that question.

The Solicitor General maintains that it would be difficult for the Government to prove that a three year post-indictment delay did not injure the defendant. This Court has already noted that it is extremely difficult, after substantial delays, for either party to prove what might have transpired if the right to speedy trial had been vindicated in the first instance. Precisely because it is quite difficult to demonstrate what *might* have happened in a hypothetical situation of a prompt trial, petitioner contends that it is important to assign the burden of proof with the utmost care. The underlying constitutional right to a speedy trial is virtually conditioned upon the proper procedural balance of burdens.

Lower federal courts have been developing and applying formulae to require the Government to prove the absence of prejudice in cases of exceptional delay caused by the prosecution. Thus, the District of Columbia Court of Appeals has been using the concept of *prima facie* merit in a speedy trial case after delay of one year. See *United States v. Mack*, 298 F.2d 509, 511 (1972). Circuit Judge Tamm on the Court of Appeals for the District of Columbia Circuit proposed a rule that went even further to protect the defendants' right to a speedy trial; he proposed automatic dismissal after one year. The Circuit Court did not endorse Judge Tamm's proposal. That

court does follow the rule that the burden of proof shifts to the Government after substantial delays have occurred. See *United States v. Rucker*, 464 F.2d 823 (D.C. 1972); *United States v. Dunn*, 459 F.2d 1115 (D.C. Cir. 1972).

The courts below in this case held that the burden to show prejudice to the defense lies on the defendant. In spite of the extraordinary, virtually unprecedented length of the delay — three years from indictment to trial — the courts found that the defendant had not come forward to prove how the delay had harmed him. Further, no consideration was given to the gross misconduct that caused the delay. Most cases involving claimed denial of the right to speedy trial involve plausible, if not justifiable explanations that can be offered without causing the court to sharply criticize the Government. Thus, in length of delay and cause of delay, this case warrants the application of a rule requiring the Government to carry the burden of proof.

The decision of the courts below is thus in direct conflict with the decisons of other federal courts. That conflict, moreover, is exacerbated by the Solicitor General's Memorandum which continues to insist that the burden lies upon petitioner.

This issue is important and timely. Litigation concerning the right to speedy trial is growing in volume throughout the nation. The manner in which those cases are tried will be a significant issue in a great percentage of the controversies that reach this Court. Resolution of the conflict in the lower courts, and rejection of the position of the Solicitor General through review of this case will be an important improvement in the

administration of justice by federal and state courts.

3. The Memorandum in Opposition restates the Government's argument throughout the proceedings in the courts below that petitioner has not proven any actual prejudice as a result of the delay. In the view of the Solicitor General, this is the dispositive issue. Disappointingly, the Solicitor General's Memorandum fails to come to grips with the manifest *possibility* of prejudice that is clearly presented. Instead, the Opposition tries to conceal the nature and extent of the probable prejudice which flows from the illegal electronic surveillance that the Government tried for so long to keep secret.

Petitioner's conviction rests upon a finding that he obstructed an S.E.C. investigation by testifying falsely about certain corporate transactions. Under the prosecution theory, petitioner was an undisclosed principal in association with an attorney, Alvin Malnik. It was Malnik's office that was "bugged" illegally in 1963. The transactions underlying the S.E.C. investigation occurred during that period. The Government maintains that its logs of the "bugging" do not contain any exculpatory matter that would have aided petitioner in his defense of non-involvement in the transactions in question. This completely self-serving statement by the Government has not been corroborated in any way; not even the selective logs have been shown to the petitioner or to the court. Had there been a timely prosecution, rather than the three year delay, petitioner would have known of the illegal surveillance and its fruits. Defense interpretation of the materials obtained by the "bugging" could differ markedly

from the bland assertions made by the Government. Leads which only the defendant could have recognized might have been revealed. The opportunity to explore ways of disputing the Government's theory of petitioner's role as undisclosed principal was lost entirely through the Government's calculated suppression of the indictment. Since the Government refuses even yet to make even the total logs available to the trial court, petitioner is powerless to give specific demonstration of the facts that would have been useful in the defense of his case. Passage of time has clouded the possibility of following out any leads that existed.

The Solicitor General simply parrots the courts below in iterating that conclusive proof of prejudice has not been made. There has been — and is — substantial proof of the significant possibility of prejudice. Under the circumstances of the extreme delay caused by the Government's unworthy and discreditable behavior, that is sufficient to show a denial of the right to speedy trial.

4. One dimension of prejudice flows directly and obviously from the prosecution stratagem of obtaining a new indictment in 1969. This was certainly intended to avoid the problem of moving on a 1966 indictment that was plainly stale. The "cover up" technique of a new indictment that was not on its face untimely, coupled with the extended effort of the prosecutors to avoid admission of the existence of an indictment already three years old, effectively deprived petitioner of the ability to exercise Rule 48(b) of the Rules of Criminal Procedure. That rule permits a defendant to seek the relief of dismissal "if there is unnecessary delay in bringing a defendant to trial." The

deception practiced by the prosecution on the defendant, and on the courts, deprived petitioner of even the *opportunity* to make this defense.

5. The Solicitor General's Memorandum entirely fails to respond to petitioner's contentions that this case is appropriate for review under this Court's supervisory powers over the administration of justice in the federal courts. This question raises centrally the issue of the fairness of the proceedings, and the Solicitor General's silence is eloquent evidence of the keen embarassment of the Government. No gloss can be fabricated to mask the abuses of power and the violations of fair play that took place here. The Government stands on a legalistic and doctrinal position that does not bear scrutiny in terms of this Court's supervisory power.

For the reasons advanced in the Petition for Certiorari, the Supplemental Brief, and this Reply Brief, it is respectfully submitted that this Court should grant certiorari.

Respectfully submitted,

BARRY I. SLOTNICK
Counsel for Petitioner

JACOB KOSSMAN
Of Counsel